

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA**

HAIR STUDIO 1208, LLC, individually and on
behalf of all others similarly situated,

Plaintiff,

v.

HARTFORD UNDERWRITERS INSURANCE
CO.,

Defendant.

CIVIL ACTION

Case No. 2:20-cv-2171

DECLARATION OF JOSEPH G. SAUDER

I, Joseph G. Sauder declare:

1. I am a partner at Sauder Schelkopf LLC, and one of the attorneys representing Plaintiff Hair Studio 1208, LLC. I am over 18 years of age and am competent to testify. The facts contained in this Declaration are based on my personal knowledge.

2. Attached hereto are true and correct copies of:

Exhibit 1: Order, *Ridley Park Fitness, LLC v. Phila. Indem. Ins. Co.*, No. 200501093 (Ct. Com. Pl. Phila. Cty. Aug. 31, 2020);

Exhibit 2: Order, *Taps & Bourbon on Terrace, LLC v. Underwriters at Lloyd's London*, No. 200700375 (Ct. Com. Pl. Phila. Cty. Oct. 26, 2020); and

Exhibit 3: Transcript of Proceedings, *Optical Servs. USA/JC1 v. Franklin Mut. Ins. Co.*, No. BER-L-3681-20 (N.J. Super. Ct. Law Div. Aug. 13, 2020).

I swear or affirm under penalty of perjury under the laws of the United States that the within and foregoing declaration which was made on the date indicated below in Berwyn, Pennsylvania, is true and correct.

DATED this 23rd day of December, 2020.

By: *s/ Joseph G. Sauder*
Joseph G. Sauder (PA#82467)

CERTIFICATE OF SERVICE

I certify that on 23rd day of December, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notice of such filing to all known counsel of record.

By: *s/ Joseph G. Sauder*
Joseph G. Sauder (PA#82467)

EXHIBIT 1

RECEIVED

AUG 31 2020

S. HARVEY, JR.
CIVIL TRIAL DIVISIONFIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

RIDLEY PARK FITNESS, LLC

Plaintiff

v.

PHILADELPHIA INDEMNITY INSURANCE
COMPANY*Defendants*

MAY TERM, 2020

NO. 01093

COMMERCE PROGRAM

CONTROL NO. 20080358

DOCKETED

AUG 31 2020

S. HARVEY, JR.
CIVIL TRIAL DIVISIONORDER

AND NOW, this 31st day of August, 2020, upon consideration of the preliminary objections filed by defendant Philadelphia Indemnity Insurance Company to plaintiff's amended complaint, and any response thereto, it is hereby

ORDERED

that the preliminary objections are **OVERRULED, without prejudice.**¹

Ridley Park Fitness, LI-ORDER



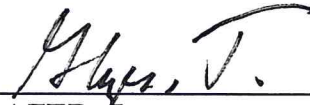
20050109300043

¹ Pursuant to Pa. R.C.P. 1028(a)(4), a party may raise a preliminary objection due to legal insufficiency of a pleading (demurrer). When considering preliminary objections, all material facts and reasonable inferences set forth in the challenged complaint must be admitted as true. Haun v. Cmty. Health Sys. Inc., 14 A.3d 120, 123 (Pa. Super. 2011) (citation omitted). A court may not consider facts that are not contained within the challenged pleading. See Detweiler v. School Dist. Of Borough of Hatfield, et al., 104 A.2d 110, 113 (Pa. 1954). Additionally, a court need not accept conclusions of law. See Dominski v. Garrett, 419 A.2d 73, 75 (Pa. Super. 1980).

This litigation arises from the denial of insurance coverage for business losses at a fitness center as a result of the COVID-19 pandemic and the resulting state and local orders mandating that all non-essential businesses be temporarily closed. Defendant alleges in the instant preliminary objections that plaintiff's failure to attach the insurance agreement in total constitutes a failure to plead, which defendant has cured by attaching the agreement in full, that certain clauses including a virus exclusion and "direct physical loss" bar coverage, and finally, that plaintiff is not entitled to a declaratory judgment.

At this very early stage, it would be premature for this court resolve the factual determinations put forth by defendants to dismiss plaintiff's claims. Taking the factual allegations made in plaintiff's complaint as true, as this court must at this time, plaintiff has

BY THE COURT:



GLAZER, J.

successfully pled to survive this stage of the proceedings. As such, the preliminary objections are overruled.

EXHIBIT 2

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION**

DOCKETED

OCT 26 2020

R. POSTELL
COMMERCE PROGRAM

TAPS & BOURBON ON TERRACE, LLC <i>Plaintiff</i>	JULY TERM, 2020 NO. 00375 COMMERCE PROGRAM CONTROL NO. 20093025
v.	
UNDERWRITERS AT LLOYDS LONDON and MAIN LINE INSURANCE OFFICES, INC. <i>Defendants</i>	

ORDER

AND NOW, this 26th day of October, 2020, upon consideration of defendant Certain Underwriters at Lloyd's, London's, improperly identified as "Those Certain Underwriters at Lloyd's London" preliminary objections to plaintiff's complaint, and any response thereto, it is hereby

ORDERED

that the preliminary objections are **OVERRULED**.¹

Taps & Bourbon On Terra-ORDER



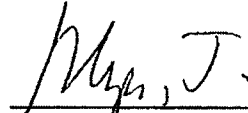
20070037500035

¹ Pursuant to Pa. R.C.P. 1028(a)(4), a party may raise a preliminary objection due to legal insufficiency of a pleading (demurrer). When considering preliminary objections, all material facts and reasonable inferences set forth must be admitted as true. Haun v. Cmty. Health Sys. Inc., 14 A.3d 120, 123 (Pa. Super. 2011) (citation omitted). A court may not consider facts that are not contained within the challenged pleading. See Detweiler v. School Dist. Of Borough of Hatfield, et al., 104 A.2d 110, 113 (Pa. 1954).

This litigation arises from the denial of insurance coverage for business losses as a result of the COVID-19 pandemic and the resulting state and local orders mandating that all non-essential businesses be temporarily closed. In the instant preliminary objections, defendant alleges that plaintiff's claim is not covered under the policy because, *inter alia*, there is no "direct physical loss" or "damage to" the property, the civil authority coverage provision does not apply, and the virus exclusion provision precludes coverage. Additionally, defendant alleges that since the claim is not covered, a bad faith claim cannot survive.

At this very early stage, it would be premature for this court resolve the factual determinations put forth by defendant to dismiss plaintiff's claims. Taking the factual allegations made the plaintiff's complaint as true, as this court must at this time, plaintiff has successfully

BY THE COURT:

A handwritten signature in black ink, appearing to read "J. Glazer", written over a horizontal line.

GLAZER, J.

pled to survive this stage of the proceedings. Moreover, the law and facts are rapidly evolving in the area of COVID-19 related business losses. Accordingly, the preliminary objections are overruled.

EXHIBIT 3

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: CIVIL PART
BERGEN COUNTY
(HEARD VIA ZOOM)
DOCKET NO: BER-L-3681-20
A.D. # _____

OPTICAL SERVICES USA/)
JC1, OPTICAL SERVICES)
USA, LLC, OPTICAL) TRANSCRIPT
SERVICES USA-WO, RE & LE)
HOLDINGS, LLC, STONG OD) OF
EWING NJ, LLC,)
) MOTION
Plaintiffs,)
)
vs.)
)
FRANKLIN MUTUAL)
INSURANCE COMPANY,)
)
Defendant.)

Place: Bergen County Justice Center
10 Main Street
Hackensack, New Jersey 07601

Date: August 13, 2020

BEFORE:

HONORABLE MICHAEL N. BEUKAS, J.S.C.

TRANSCRIPT ORDERED BY:

AMINA RANA, (Paul Weiss Rifkind Wharton Garrison)

APPEARANCES:

SEAN E. ROSE, ESQ. (Olender Feldman, LLP)
Attorney for Plaintiffs

ERIC L. HARRISON, ESQ. (Methfessel & Werbel)
Attorney for Defendant

Transcriber: Laura Scicutella
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Audio Recorded
Recording Opr: Alexa D'Angelo

I N D E X

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(Proceeding commenced at 9:30:49 a.m.)

THE COURT: Superior Court of the State of New Jersey, Bergen County Vicinage, clerk recording, Alexa D'Angelo law clerk, docket number BER-L-3681-20, caption is Optical Services USA/JCI (sic), Optical Services USA, LLC, Optical Services USA-WO, and Re and Le Holdings, LLC, Stong OD Ewing NJ, LLC versus Franklin Mutual Insurance Company. Judge Michael N. Beukas, chambers 453. The time is approximately 9:32 a.m. May I have the appearances of counsel for the record, please, starting with the plaintiff?

MR. ROSE: Good morning, Your Honor. Sean Rose from the law firm of Olender Feldman on behalf of plaintiff, Optical Services USA/JC1, Optical Services USA, LLC, Optical Services USA-WO, Re and Le Holdings, LLC, and Stong OD Ewing NJ, LLC, collectively plaintiffs, Your Honor.

THE COURT: Good morning, Counsel.

MR. ROSE: Good morning.

MR. HARRISON: Good morning, Judge. Eric Harrison, Methfessel and Werbel, on behalf of Franklin Mutual Insurance Company.

THE COURT: Good morning, Counsel. Okay, gentlemen, just a -- a couple of --

RECORDING: (Indiscernible) --

1 THE COURT: -- reminders before we --

2 RECORDING: -- is now in the conference.

3 MR. HARRISON: Your Honor, this is Eric
4 Harrison speaking. As a courtesy, I should let the
5 Court know I do have a few folks dialing in. They've
6 all been instructed to keep their phones on mute.
7 Various FMI representatives and a colleague of mine
8 will be listening in but will not be participating.

9 THE COURT: Okay, very good.

10 For purposes of our established record here
11 today, gentlemen, when you do speak at oral argument, I
12 do need you to identify yourself in between oral
13 arguments so that the transcription service can clearly
14 identify which attorney is speaking.

15 When you are referencing an oral argument to
16 any specific controlling case, I need you to identify
17 that case for the record and pursuant to Rule 1:36-3, I
18 need you to identify for the record whether that is a
19 published opinion in the State of New Jersey versus an
20 unpublished opinion and whether or not you are citing
21 to any law of any other jurisdiction including the US
22 Supreme Court so that I can identify for the record as
23 to whether or not any of the law is controlling in this
24 case for purposes of oral argument.

25 In addition, we are on a Polycom speaker

1 today and at times it may be difficult for you to hear
2 me and I may need to interject to pose a question to
3 either attorney so I may have to elevate my voice so
4 that you can hear me clearly. So please don't
5 misconstrue me elevating my --

6 RECORDING: (Indiscernible) --

7 THE COURT: -- voice --

8 RECORDING: -- is now in the conference.

9 THE COURT: Okay, gentlemen, I -- if I need
10 to elevate my voice, it's for purposes of the Polycom
11 picking up my voice so that you can hear it, okay.

12 So I have before me a Motion to Dismiss the
13 Complaint for failure to state a claim upon which
14 relief can be granted pursuant to Rule 4:6-2(e) filed
15 by the defendant, Franklin Mutual Insurance Company.
16 So, Mr. Harrison, this is your Motion. You may
17 proceed.

18 MR. HARRISON: Yes, sir. Thank you, Your
19 Honor. We are all aware, I know plaintiffs' counsel is
20 aware, certainly my firm as an insurance defense firm
21 is well aware of the fast-moving nature of developments
22 in insurance litigation and other litigation over
23 Covid-19. Two significant events happened yesterday
24 and they're both worthy of mention. The first is, and
25 this is not within the record, but the Court -- it's

1 not important to the Court's decision on the policy
2 language, but it's -- it's significant background. The
3 multi-district litigation panel of the United States
4 District Court denied a nation-wide Motion to
5 Consolidate these business interruption litigations
6 that are venued in various Federal Courts around the
7 country essentially on the basis that the policy
8 language differs from policy to policy. Even though a
9 lot of insurers use (indiscernible) income and would
10 other insurers, there is still significant differences
11 between those forms and the facts of particular cases
12 also can determine whether there would be coverage and
13 to what extent.

14 The second significant thing to happen
15 yesterday was the issuance of the decision that Mr.
16 Rose brought to the Court's attention, and I don't have
17 any objection to his filing it yesterday because it
18 didn't come out until yesterday and I have had ample
19 time to review it. It's the Studio 417 case from U.S.
20 District Court, Western District of Missouri, Southern
21 Division. This opinion, which I'm not going to
22 significantly disagree with, demonstrates the wisdom of
23 the MDO panel in refusing to consolidate because the
24 denial of the Motion to Dismiss based on the
25 allegations in that complaint bespeaks the importance

1 of policy language differing from policy to policy and
2 alleged facts differing from complaint to complaint.

3 I should ask as a courtesy whether the Court
4 has any objection to me talking about this case that
5 Mr. Rose sent yesterday.

6 THE COURT: What I would like you to do,
7 Counsel, is argue your Motion to Dismiss. This Court
8 is bound by the implications of Rule 1:36-3. While the
9 parties felt compelled to cite to numerous other
10 jurisdictions with respect to their arguments, their
11 respective arguments both on the Motion and in the
12 Opposition, this Court is bound by legal precedent
13 within the State of New Jersey, namely the Appellate
14 Division, and the New Jersey Supreme Court. With
15 respect to the US Supreme Court, this -- this Court
16 also takes precedent from the US Supreme Court for
17 controlling decisions. So this Court will give
18 whatever weight is necessary to whatever arguments
19 reflect in the controlling legal precedent set forth in
20 this state as opposed to other states. So you may
21 proceed with the argument.

22 MR. HARRISON: Okay, thank you, Your Honor.
23 I just -- I just wanted to make sure that the Court
24 didn't want me to completely disregard this decision.
25 But I'm going to highlight it simply to contrast it

1 with a case we're looking at in order to argue my
2 position under New Jersey law.

3 The Studio 417 decision describes a policy
4 which defines a covered cause of loss, and that's at
5 page 2 of the opinion, as follows, "Accidental direct
6 physical loss or accidental direct physical damage."
7 It goes on to say on the same page, "The policies do
8 not include and are not subject to any exclusion for
9 losses caused by viruses or communicable diseases."

10 Now, I want to be clear about something. I
11 want to be clear about a point of agreement that
12 Franklin Mutual has with the plaintiffs in this case.
13 At paragraph 36 of the Complaint filed in this case,
14 plaintiffs recite as follows, "There is no known
15 instance of Covid-19 transmission or contamination
16 within the premises of plaintiffs' businesses." Now,
17 the declamation of coverage letter that FMI issued
18 prior to the Complaint being filed in this case because
19 the Complaint challenges that declamation of coverage
20 find it among relevant policy provisions the exclusion
21 of 12(c) for contamination by any virus, et cetera.
22 Because the complaint expressly asserts that there was
23 no contamination and because it is our universal duty
24 to read as accurate all facts alleged in the complaint
25 and I agree that the contamination exclusion would not

1 apply to this case. If the complaint had alleged that
2 there was contamination on the premises, then there
3 probably would be direct physical loss, but there would
4 also be exclusion of coverage under that virus
5 exclusion. So what we're really focused on is the
6 policy language. In Studio 417, the definition of loss
7 there was physical loss or physical damage.

8 THE COURT: Okay, but we're concerned about
9 New Jersey. We're not concerned about the Western
10 District of Missouri; correct?

11 MR. HARRISON: That is true, Your Honor, but
12 we are concerned about policy language defining direct
13 physical loss, --

14 THE COURT: Okay, but the --

15 MR. HARRISON: -- but I'm -- I'm happy to
16 take it --

17 THE COURT: -- definition (indiscernible) --

18 MR. HARRISON: -- to our policy language.

19 THE COURT: -- definition has not been
20 established by any court in this state with the
21 exception of the Wakefern case; correct?

22 MR. HARRISON: I think that is absolutely
23 correct.

24 THE COURT: Okay, I just want to establish
25 that for purposes of the record.

1 MR. HARRISON: Okay, so back to our policy.
2 The business interruption loss that -- of which
3 plaintiffs seek to avail themselves governs loss of
4 income resulting from direct covered loss. We go to
5 page 9 of the policy form which expressly defines
6 direct covered loss as follows, "The fortuitous direct
7 physical loss as described in Part 1(c), General Cause
8 of Lost Conditions, Coverages A, B, C, which occurs at
9 described premises occupied by you." Now, the
10 definition is (indiscernible) if it didn't refer -- if
11 it didn't cross-reference another definition, then we'd
12 be fighting over whether the closure of a business
13 because of a risk of virus spread would constitute a
14 fortuitous direct physical loss.

15 However, because it cross-references the
16 description of direct covered loss that's also in the
17 policy at page 8. We go to the more detailed
18 definition. Covered loss, "Means fortuitous direct
19 physical damage to or destruction of covered property
20 by a covered cause of loss." The requirement of direct
21 physical damage to or destruction of (indiscernible) --

22 RECORDING: (Indiscernible).

23 MR. HARRISON: -- requirement of direct
24 physical damage to or destruction of covered property
25 distinguishes this case from the Studio 417 case in

1 that there is the physical damage or destruction
2 requirement that was absent in that case which also had
3 --

4 RECORDING: (Indiscernible) is now in the
5 conference.

6 MR. HARRISON: -- I apologize -- which also
7 had the open-ended concept of loss which was not
8 defined. Our policy defines loss as requiring that
9 physical impact.

10 The Court has reviewed Wakefern I know and
11 the -- the cases -- the New Jersey cases discussed in
12 our brief I agree that there is no case directly on
13 point construing the -- this precise policy language in
14 the context a claim where there was a closure of a
15 business because of the risk of contamination by a
16 virus. But I think that the application of loss that's
17 set forth in New Jersey and in the other jurisdictions
18 we've cited as persuasive, although not binding,
19 compels the conclusion that this did not meet the
20 policy definition of direct covered loss to satisfy
21 coverage.

22 THE COURT: Counsel, let me pose -- let me
23 pose one question to you. Why didn't the policy then
24 have specific exclusions for an event such as this?
25 Meaning for virus proliferation.

1 MR. HARRISON: Well, it -- it precisely has
2 an exclusion for virus proliferation. It does not have
3 an exclusion for a closure of business based on the
4 risk of virus proliferation. I can't speak to the
5 drafters of the policy other than to say this is an
6 unprecedented event. First in my lifetime. First in
7 my parents and our parents. So, yeah, in -- in an
8 ideal world all potential cataclysmic risks could be
9 underwritten and determined in advance as to what we're
10 going to cover and to what extent or whether there
11 should be any coverage at all, but before we get to the
12 absence of an exclusion, and I agree there is no
13 exclusion that would apply on the facts as alleged in
14 this Complaint, we have to satisfy the coverage
15 definition first.

16 THE COURT: You can proceed, Counsel. Thank
17 you.

18 MR. HARRISON: I -- Your Honor, to -- to be
19 candid, I know you've reviewed the papers. I'm happy
20 to address any further questions the Court may have or
21 simply reserve an opportunity to respond to my
22 colleague. I -- I think between our papers and what
23 I've had to say this morning that I've stated our case.

24 THE COURT: Thank you, Counsel. Okay, Mr.
25 Rose, your response?

1 MR. ROSE: Thank you, Your Honor. And just
2 to try to make sure that there's a clean record
3 virtually, this is again Sean Rose, Olender Feldman, on
4 behalf of plaintiff.

5 So contrary to the insurance industry's well
6 rehearsed talking points and -- and Mr. Harrison has a
7 very good brief and very good argument, the simple fact
8 is that plaintiff and the many other in the -- and
9 (indiscernible) plaintiffs purchased business owners
10 policies to insure against, among other things,
11 unexpected business interruptions. And what happened
12 back in March, as we all know because we all lived
13 through it, that's about as unexpected as you get.
14 Plaintiffs were forced to close their businesses
15 because the executive order issued by the State --
16 well, the State pertinent to here, but issued across
17 the country in emergency response to the pandemic found
18 that there is a dangerous condition on plaintiffs'
19 property. As a result of those orders, the plaintiffs
20 closed. All residents were told to stay at home and
21 (indiscernible) claims (indiscernible).

22 Now, as Mr. Harrison pointed out, the
23 briefing reflects that there are really two main points
24 of argument that -- that I'll hit quickly because they
25 are recited at length in the brief is the first

(indiscernible) on the direct physical loss issue. We know from, and just to again bide by Your Honor's directive, we know that under the Gregory Packaging, Inc. versus Travelers Property Casualty Company of America case, which is an unpublished case, but from the District of New Jersey and cited in both Mr. Harrison's and our brief, we know that a dangerous condition on the property can constitute a physical loss. Now, here, we have an executive order that found that plaintiffs' businesses were deemed unfit and unsafe because of a dangerous condition. Plaintiffs' loss of income caused by the closure orders concluding that there was a dangerous condition on the property is a direct physical loss. Alternatively, if we wanted to get into the legal standard, at a minimum, it is plausible the plaintiffs have alleged a direct physical loss here which should defeat a (indiscernible) Motion and allow plaintiffs to pursue discovery, among other things, to discern the true intent behind policy terms which, in some cases, points to coverage but in other cases it may be ambiguous.

The second point would be the civil authority coverage and I -- I think here, the Western District of Missouri case has instructed, and I'll get to that in a second, here we -- we, again, we know what happened.

1 We all lived through it. The closure orders forced
2 plaintiffs to close and banned occupancy of all non-
3 essential businesses. In doing so, the closure orders
4 necessarily not only affected plaintiffs' businesses,
5 but they affected all -- all properties around
6 plaintiffs. It was a stay-at-home order. Unless it
7 was an essential business, everything was closed. It's
8 alleged -- it -- it's in the Motion and, you know,
9 beyond that, Your Honor, we all lived through it. We
10 were all there. So, again, at a minimum, it is
11 plausible that plaintiffs are entitled to
12 (indiscernible) coverage here. And unless Your Honor
13 has any questions, I know the briefing was fairly
14 detailed.

15 THE COURT: Thank you, Mr. Rose. You know,
16 at the outset, gentlemen, I do commend the both of you
17 with respect to a very, very difficult topic and
18 concept in the State of New Jersey with regard to the
19 interpretation of insurance law. I did find that the
20 respective briefs were very well drafted.

21 Mr. Harrison, do you have a reply at this
22 point?

23 MR. HARRISON: Briefly, Your Honor, yes. Mr.
24 Rose says the executive order for -- forced closure
25 based on a finding that there was a dangerous condition

1 on plaintiffs' property. That's -- that's simply not
2 the case. The -- the Complaint does not allege that.
3 I understand what he's saying. It -- it's a -- it's a
4 directive closing down non-essential businesses based
5 on the risk that putting people in proximity to each
6 other indoors could result in transmission of the
7 virus, could -- it could result in the virus sitting on
8 a piece of equipment in one of the plaintiffs'
9 examining rooms, but the Complaint in this case
10 expressly alleges that there has been no known instance
11 of Covid-19 transmission or contamination.

12 I -- I get it that this is business
13 interruption insurance and to quote one of the judges I
14 appeared before in my first year arguing coverage
15 motion, he said, Mr. Harrison, before we turn to the
16 policy terms, everybody knows that when an insured buys
17 insurance for something, their reasonable expectation
18 is that they're going to be covered for whatever might
19 befall them, but then we got to go to the policy
20 language and if indeed coverage was determined by the
21 name of the coverage, business interruption, well, then
22 the insurance industry loses and FMI loses this case
23 because we're not disputing that there was business
24 interruption. Although if we were to have to dig
25 deeper, we would probably have a dispute over whether

1 plaintiffs were non-essential businesses, but that's
2 not what this Motion is about. The law requires that
3 we look carefully at the policy language. And with
4 reference to Gregory Packaging, we're talking about the
5 release of ammonia into the air, talking about
6 something physically occurring and I think it's -- it's
7 clear from the plain policy language and the meaning of
8 the terms, which are precisely defined in the policy,
9 that in this instance under this policy based on these
10 allegations there is no direct covered loss.

11 In -- in asking for discovery to determine
12 the true intent behind policy terms, right, that's
13 something you need to speak about briefly. When policy
14 language is clear, I am not aware of any precedent
15 which would support denial of a Motion to Dismiss on
16 the basis that the plaintiff is entitled to conduct
17 discovery to see what the drafter of the document, who
18 I can tell the Court was not -- is not an employee of
19 FMI, had in mind when defining direct covered loss or
20 covered loss.

21 There -- there is -- in New Jersey we do have
22 a -- a big case called Morton International which has
23 to do with pollution exclusions and that's where our
24 courts created this -- the concept of regulatory
25 estoppel where essentially the insurance industry

1 lobbied to insert a particular form of coverage within
2 a policy with an exclusion for -- that applied to
3 environmental losses and essentially the courts found,
4 hey, you came to the Department of Banking and
5 Insurance putting forth this policy language suggesting
6 it would do something and then you went to court and
7 suggested otherwise. There is no such allegation in
8 this case. I haven't seen any such allegation even
9 made in the press or -- or by the various
10 (indiscernible) or -- or in any case that's being
11 litigated that I'm aware of. When the plain policy
12 terms apply plainly and directly to the facts asserted,
13 I'm not aware of any legitimate basis for denying a
14 Motion based on the facts accepted as true in the
15 pleading on the basis that plaintiff wishes to take
16 discovery to see what the defendant meant by policy
17 language that somebody else wrote which the defendant
18 adopted if the plain language controls and is
19 unambiguous and I submit that it does control and it is
20 unambiguous here.

21 THE COURT: Thank you. Gentlemen, thank you,
22 very much. I'm prepared to rule on this Motion.

23 This matter comes before the Court on a
24 Motion Seeking Dismissal of the plaintiffs' Complaint
25 with prejudice pursuant to Rule 4:6-2(e). The Court

1 begins with a few general observations concerning the
2 standards governing dismissal motions under Rule 4:6-
3 2(e) by citing Flinn v. -- Flinn v. Amboy National
4 Bank, 40 -- 436 N.J.Super. 274 (App. Div. 2014), "In
5 reviewing a complaint dismissed under Rule 4:6-2(e),
6 the inquiry is limited to examining the legal
7 sufficiency of the facts alleged on the face of the
8 complaint," citing Printing Mart-Morristown versus
9 Sharp Electronics Corp., 116 N.J. 739 at page 746
10 (1989) and Rieder versus Department of Transportation,
11 221 N.J.Super. 547 at page 552 (App. Div. 1987).

12 The essential test as set forth in Green
13 versus Morgan Properties, 215 N.J. 431 at page 451
14 (Sup. Ct. 2013) is, "Whether a cause of action is
15 'suggested' by the facts," citing Printing Mart-
16 Morristown versus Sharp Electronics Corp., 116 N.J. at
17 746 quoting Velantzas versus Colgate-Palmolive Co., 109
18 N.J. 189 at page 192 (1988).

19 "A reviewing court searches the complaint in
20 depth and with liberality to ascertain whether the
21 fundamental of a cause of action may be gleaned, even
22 from an obscure statement of claim, opportunity being
23 given to amend if necessary," citing Di Cristofaro
24 versus Laurel Grove Memorial Park, 43 N.J.Super. 244 at
25 page 252 (App. Div. 1957).

1 In the case of Rule 4:6-2(e), Dismissals,
2 "The Court is not concerned with the ability of the
3 plaintiffs to prove the allegation contained in the
4 complaint," citing Somers Construction Co. versus Board
5 of Education, 198 F.Supp. 732, 734 (Dis. NJ. 1961).

6 Instead,

7 "The plaintiffs are entitled to every
8 reasonable inference of fact and the examination of a
9 complaint's allegations of fact required by the
10 aforestated principle should be one that is at once
11 painstaking and undertaken with a generous and
12 hospitable approach,"

13 citing Green versus Morgan Properties, 215
14 N.J. 431 at page 452 quoting Printing Mart-Morristown
15 versus Sharp Electronics Corp., 116 N.J. at 746.

16 Notwithstanding this indulgent standard, "A
17 pleading should be dismissed if it states no basis for
18 relief and discovery would not provide one," citing
19 Rezem Family Associates, LP versus Borough of
20 Millstone, 423 N.J.Super. 103 at page 113 (App. Div.
21 2011), cert. denied and the appeal was dismissed at 208
22 N.J. 366 (2011). See also Sickles versus Cabot Corp.
23 379 N.J.Super. 100 at page 106 (App. Div. 2005) cert.
24 denied at 185 N.J. 297 (2005).

25 In those rare instances, as cited in Smith

1 versus SBC Communications, Inc., 178 N.J. 265 at page
2 282 (2004), a motion to dismiss pursuant to Rule 4:6-
3 2(e) ordinarily is granted without prejudice. See
4 Hoffman versus Hampshire Labs Incorporated, 405
5 N.J.Super. 105, 116 (App. Div. 2009).

6 The defendant, Franklin Mutual Insurance
7 Company, hereinafter FMI, issued a business owners
8 policy to plaintiff, Optical Services USA/JC1 under
9 policy number SBP2598006 with effective dates of
10 October 5, 2019 to October 5, 2020. FMI issued the
11 business owners policy to the plaintiff, Stong OD Ewing
12 NJ, LLC, hereinafter Stong OD, bearing policy number
13 SBP2613680 with effective dates of April 1, 2020 to
14 April 1, 2021. Optical Services USA/JC1 and Stong OD
15 filed separate claims seeking loss of business income
16 caused by the closure mandated by Governor Murphy's
17 March 21, 2020 Executive Order Number 107 suspending
18 the operation of non-essential retail businesses on the
19 account of the Covid-19 pandemic. Plaintiffs closed
20 their businesses on March 20, 2020 and have not
21 reopened to date. Plaintiffs allege that Executive
22 Order Number 107 mandated the closure of their
23 businesses. FMI issued letters dated April 6, 2020 and
24 April 14, 2020 to Optical Services USA/JC1 and Stong OD
25 denying their claims for business income and related

1 expenses. Plaintiffs, Optical Services USA, LLC,
2 Optical Services USA-WO, Re and Le Holdings, LLC were
3 not named insureds on either policy.

4 Both policies contained the BU04010110
5 Business Owners Policy Form. The plaintiffs allege
6 that the -- the plaintiffs allege that Optical Services
7 USA/JC1, Optical Services USA, LLC, Optical Services
8 USA-WO, Re and La -- and Le Holding, LLC and Stong OD
9 Ewing NJ, LLC purchased business interruption insurance
10 from insurers to protect their business from an -- an
11 unanticipated crisis. The plaintiffs further allege
12 that the policies issued by FMI provide coverage for
13 loss of income resulting from a necessary interruption
14 of plaintiffs' businesses caused by direct covered
15 losses and temporary closures required by orders of a
16 civil authority.

17 A Complaint for a Declaratory Judgment in
18 this action was filed on June 25, 2020. The Complaint
19 also included a Demand for Trial by Jury. No answer
20 has been filed by the defendant, FMI. Therefore, the
21 discovery end date has not been established in this
22 case.

23 On July 15, 2020, the defendant, FMI, filed a
24 Motion Seeking Dismissal of the Complaint pursuant to
25 Rule 4:6-2(e). Within days of filing the Complaint,

1 the defendant, FMI, filed the within Motion to Dismiss.
2 It is clear that there is no established record in this
3 case and there has been no discovery presented to the
4 Court for consideration with respect to the arguments
5 and events by respective legal counsel.

6 Notwithstanding same, the defendants argued three
7 points before this Court. The first legal argument is
8 that the Court should dismiss the complaint for failure
9 to state a legally cognizable claim. The second legal
10 argument is that the plaintiffs did not sustain direct
11 physical loss or direct physical damage to or
12 destruction of covered property precluding coverage for
13 business income or extra expenses under the FMI policy.
14 Lastly, the defendants argue that the plaintiffs
15 occupancy of their respective properties was not
16 prohibited by civil authorities because of a loss at a
17 local premises not owned or occupied by the plaintiffs
18 precluding civil authority coverage under the FMI
19 policies.

20 The plaintiffs argue before this Court that
21 they state claims for coverage under the policies
22 because they suffered a direct covered loss and were
23 forced to close their business by order of a civil
24 authority. Plaintiffs further allege that they state
25 claims for loss of income coverage because they

1 suffered a direct covered loss under the policy and
2 they state claims for civil coverage because the
3 closure order prohibited the plaintiffs from accessing
4 their business.

5 Naturally, each of the respective arguments
6 advanced by the parties requires a fact-sensitive
7 analysis wherein the respective parties have failed to
8 present a sufficient record before this Court for a
9 legal determination of their respective positions.
10 There has been no discovery produced to the Court for
11 consideration, no affidavits, no certifications, or
12 sworn testimony derived from depositions. In fact,
13 discovery has not been undertaken by the parties with
14 respect to the declaratory relief sought in the
15 Complaint. Notwithstanding these deficiencies, the
16 Court will endeavor to address the legal arguments
17 advanced by the respective parties on the extremely
18 limited record provided to the Court.

19 The defendant, FMI, concedes that the
20 plaintiffs' business operations were interrupted by an
21 executive order based on the risk of the Covid-19 virus
22 transmission throughout the State of New Jersey. The
23 pivotal issue before this Court is the parties'
24 interpretation of the subject policy language and FMI's
25 claim denial premised on a narrow interpretation of the

1 terms of the subject policies. The issue before this
2 Court is the interpretation of a direct covered loss
3 under the policy and whether or not there was physical
4 damage to the plaintiffs' business.

5 The plaintiffs argue that the loss of
6 physical functionality and the use of their business
7 constitutes a covered loss under the policies. The
8 plaintiffs argue that Governor Murphy's executive order
9 prohibited access to the plaintiffs' premises.

10 FMI argues that the plaintiffs failed to
11 state a claim for civil authority coverage because the
12 complaint does not allege that property damage occurred
13 elsewhere leading to the loss of access to plaintiffs'
14 business. The defendant acknowledged in their moving
15 papers that presumably the plaintiffs will argue that
16 while their properties were not physically damaged,
17 they sustained a physical loss by operation of the
18 Governor's executive order. FMI argues that the
19 plaintiffs' loss of use of their respective properties
20 does not constitute a direct physical loss and
21 therefore is not a direct covered loss defined by the
22 policies.

23 A simple review of the moving papers
24 indicates that the defendant has not provided this
25 Court with any controlling legal authority to support

1 their version of the interpretation of the defined
2 terms in the policy. In fact, there is limited legal
3 authority in the State of New Jersey addressing this
4 issue. This is not surprising to the Court as the
5 State of New Jersey was recently faced with a historic
6 event which was unprecedented with respect to the
7 losses sustained by businesses across the State of New
8 Jersey due to the proliferation of the Covid-19
9 pandemic. The defendant argues that there is a plain
10 meaning of "direct physical loss" and the closure of
11 the plaintiffs' business does not qualify for business
12 -- I'm sorry, qualify for purposes of coverage. This
13 is a blanket statement unsupported by any common law in
14 the State of New Jersey or by a blanket review of the
15 policy language. Moreover, there has been no discovery
16 taken in this matter which would provide guidance to
17 the Court with respect to a Motion to Dismiss filed
18 under Rule 4:6-2(e).

19 Pursuant to the legal authority recited by
20 this Court with regard to the standards associated with
21 filing such a motion, the plaintiff should be permitted
22 to engage in issue-oriented discovery and also be
23 permitted to amend its complaint accordingly prior to
24 an adjudication on the merits of any policy language.
25 Such a motion is premature at best.

1 It is noteworthy to mention that the
2 plaintiffs' argument set forth to this Court that the
3 loss of use of their business because the State of New
4 Jersey deemed all non-essential businesses unsafe
5 constitutes a direct covered loss under the policy is
6 the pivotal issue in the absence of any issue-oriented
7 discovery on this topic is whether direct physical loss
8 and direct physical damage encompasses closure for
9 businesses that bears no specific -- relationship to a
10 specific condition on the property pursuant to an
11 executive order. The plaintiffs counter that argument
12 by alleging that the executive order of the Governor
13 deemed all non-essential businesses unsafe given the
14 risk of transmission of Covid-19 thus the closure order
15 had a specific relationship to a specific condition
16 within the plaintiffs' business.

17 The plaintiffs provide a citation from
18 Wakefern Food Corp. versus Liberty Mutual Fire
19 Insurance Company, 406 N.J.Super. 524 (App. Div. 2019)
20 to support their argument. Their argument based on the
21 holding of Wakefern is that there was a finding of
22 coverage for a grocery store that lost power when an
23 electrical grid and transmission lines were physically
24 incapable of performing their essential function of
25 providing electricity even though they were not

1 necessarily damaged. The Court in Wakefern did hold
2 that,

3 "Since the term "physical" can mean more than
4 material alteration or damage, it is incumbent on the
5 insurer to clearly and specifically rule out coverage
6 in the circumstances where it was not to be provided."

7 Citing Wakefern versus Liberty Mutual
8 Insurance Company, 406 N.J.Super. at 542. Also citing
9 Customized Distribution Services versus Zurich
10 Insurance Co., 373 N.J.Super. 480 at page 491 (App.
11 Div. 2004), cert. denied at 183 N.J. 214 (2005).

12 The Court finds such an argument compelling
13 for purposes of surviving a Motion to Dismiss pursuant
14 to Rule 4:6-2(e) in the absence of any complete record
15 for disposition. Again, the Court notes in the absence
16 of the legal precedent set forth in Wakefern, there is
17 a lack of controlling legal authority presented to the
18 Court for consideration in this regard.

19 "When interpreting insurance contracts, the
20 intention of the parties must be determined from the
21 language of the policy," citing Stone v. Royal
22 Insurance Company, 211 N.J.Super. 246 at page 248 (App.
23 Div. 1986). "When the terms of the contract are clear
24 and unambiguous, the Court must enforce the contract as
25 written." That is an incitation at page 248.

1 The language which forms the basis of the
2 complaint and the filing of a Motion to Dismiss is
3 subject to further analysis and interpretation. By
4 operation of the distinct and opposite interpretations
5 of the language set forth before the Court by the
6 parties with no other clarity from the record having
7 been established to date, which the Court notes is
8 largely non-existent, this Court reaches the inevitable
9 conclusion solely for purposes of disposition of this
10 Motion that the plaintiff should be afforded the
11 opportunity to develop their case and prove before this
12 Court that the event of the Covid-19 closure may be a
13 covered event under the Coverage C, Loss of Income,
14 when occupancy of the described premises is prohibited
15 by civil authorities. There is an interesting argument
16 made before this Court that physical damage occurs
17 where a policy holder loses functionality of their
18 property and by operation of civil authority such as
19 the entry of an executive order results in a change to
20 the property.

21 The plaintiffs are offering in advancing in a
22 novel theory of insurance coverage in this matter that
23 warrants a denial of the Motion to Dismiss at this
24 early stage of the litigation. As such, this Court
25 must afford the plaintiffs an opportunity to engage in

1 issue-oriented discovery with FMI in order to fully
2 establish the record with respect to direct covered
3 losses and to amend the Complaint accordingly if
4 required. To that end, the Motion to Dismiss is
5 denied.

6 Gentlemen, I will have an order prepared and
7 most likely uploaded by this afternoon. Again, I want
8 to thank you for your briefs and I thank you for your
9 legal arguments here today.

10 MR. HARRISON: Thank you, Your Honor. Have a
11 good weekend.

12 THE COURT: Thank you, gentlemen.

13 (Proceeding concluded at 10:08:29 a.m.)

14 * * * * *

CERTIFICATION

I, Laura Scicutella, the assigned transcriber, do hereby certify the foregoing transcript of proceedings on CourtSmart, Index No. from 9:30:49 to 10:08:29, is prepared to the best of my ability and in full compliance with the current Transcript Format for Judicial Proceedings and is a true and accurate non-compressed transcript of the proceedings, as recorded.

/s/ Laura Scicutella

Laura Scicutella

AD/T 685

AOC Number

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Agency Name

8/18/2020

Date